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No. 90-1733

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES E. BROWN AND WELLINGTON MITCHELL,
Petitioners,

v.

SECRETARY OF THE ARMY, et. al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS

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The respondents concede that the Back Pay Act ("Act") has been applied to employees who would have been promoted absent an agency's failure to comply with the law. Opp. cert. 10. But, they endeavor to distinguish petitioners' promotions by offering what they call a "fundamental distinction" between promotions denied in violation of prescriptive laws, of which they provide no examples, and those denied in violation of proscriptive laws such as Title VII. *Id.* Respondents' contention that back pay is available in the former scenario, but not in the latter, finds no support in the authority construing the Back Pay Act's coverage, and displays a striking misunderstanding of Title VII jurisprudence. Ultimately, respondents' position that *United States v. Testan*, 424 U.S. 392 (1976), bars Back Pay Act coverage of promotion denials cannot be sustained.

The government's effort to minimize the split in authority concerning the Act's coverage of wrongfully withheld promotions is equally unavailing. Not only does the decision below call into question agency interpretations of the Act

stretching back to the early 1970s, it is also inconsistent with the approaches to the issue taken by the Federal and Tenth Circuits.

1. Petitioners have demonstrated that interpretations of the Act by the Comptroller General and the Civil Service Commission ("CSC")—expressly relied upon by Congress when it amended the Act in 1978—authorized back pay for denials of competitive promotions where employees would have been promoted absent a violation of applicable law.[1] *See* Pet. 13-20. Yet, according to respondents, such showing is "not enough" to demonstrate that the Back Pay Act should apply to the denial of petitioners' promotions. Opp. cert. 10. The reason, respondents assert, is that there are two "very different" scenarios in which the denial of competitive promotions occur. Opp. cert. 10. They are (1) when an agency violates a statute prescribing a particular course of conduct, and (2) when an agency violates a statute prohibiting a particular course of conduct, such as considering race in a competitive promotion decision. The government states that while the Back Pay Act affords relief under the first scenario, it provides no coverage for promotions denied under the second.

No authority is cited for the distinction that the government propounds. Nor, does authority exist to support this distinction. An examination of the Comptroller General decisions and the regulations and interpretations of the Act issued by the CSC—a task notably eschewed by respondents—indicates that these authorities never recognized a distinction between prescriptive and proscriptive provisions when awarding back pay for denials of competitive promotions. Indeed, to allow the award of back pay to turn on a determination whether the law violated by the offending conduct is set forth affirmatively or negatively would plainly elevate form over substance since any legal rule can be drafted

[1] Although review is sought from orders denying awards of prejudgment interest, the issue presented by this petition, and the inquiry that led to the denial of prejudgment interest below, is whether the Back Pay Act authorizes the award of back pay for the unlawful denial of competitive promotions.

in prescriptive as well as proscriptive language. Just as there is no substantive difference between a law governing promotions that states "The agency shall consider only a candidate's qualifications" and one that reads "The agency shall not consider factors other than a candidate's qualifications," there can be no justification for awarding back pay here under one side of the government's distinction and not under the other.

Indeed, the administrative authorities that the respondents concede support the award of back pay under the Act are indistinguishable from the present cases. *See* Opp. cert. 9 n.4, citing *Veterans Administration Hospital v. American Fed'n of Gov't Employees*, 4 F.L.R.A. 419, 424 (1980) and 54 Comp. Gen. 312 (1974) (quotation reprinted at Pet. App. 77a).

In *Veterans*, the F.L.R.A. upheld an award of retroactive promotion and back pay to a grievant denied a competitive promotion in violation of a collective bargaining agreement. The grievant protested his lack of selection for a competitive promotion on grounds that the appraisal by his immediate supervisor lacked the independence required by the collective bargaining agreement and the selectee's military experience was given improper weight in violation of the agreement's rating procedures. 4 F.L.R.A. at 419. After concluding that relevant provisions of the collective bargaining agreement had been violated, the arbitrator "reconstructed" the selection process and determined that the "[g]rievant, who was the only other candidate rated as 'highly qualified,' would have been selected but for the improper selection. . . ."[2] *Id.* at 420. Accordingly, back pay was awarded to remedy the violation of a collective bargaining agreement whose terms were no more or less proscriptive than the provisions of Title VII.

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[2] In sustaining the award, the F.L.R.A. noted that "[it] is well established that the Back Pay Act provides the appropriate authority to remedy an unjustified or unwarranted personnel action that has denied an aggrieved employee a promotion that the employee would otherwise have received." *Id.* at 424. The Authority also rejected the Veteran Administration's argument that *United States v. Testan*, 424 U.S. 392 (1976) barred the award. As petitioners have argued here, the Authority interpreted *Testan* to hold only that the Back Pay Act provides no relief to employees alleging wrongful civil service classification. 4 F.L.R.A. at 424.

Similarly, in 54 Comp. Gen. 312 (1974), *reprinted* at Pet. App. 69a, the second authority cited with approval by the respondents, the Comptroller General affirmed an arbitrator's award of retroactive promotion and back pay under the Back Pay Act to an employee denied a competitive promotion when the agency violated a provision of the collective bargaining agreement governing its merit promotion process. The agreement created a preference in filling job vacancies that favored the selection of agency employees over comparably-qualified outside applicants. *Id.* at 314, Pet. App. 70a. Like Title VII, which bound the respondents by the force of law, this provision bound the agency upon adoption of the collective bargaining agreement of which it was part. *See id.* at 318, Pet. App. 77a. The arbitrator found that the agency had violated this provision when it filled a clerical vacancy with an applicant no better qualified than four agency candidates for the position. *Id.* at 313, Pet. App. 69a. By reconstructing the selection process and selecting the candidate who would have been chosen without the competition from outside applicants, as the collective bargaining agreement required, the agency was required to award back pay to the selectee pursuant to the Back Pay Act. *Id.* at 318-19, Pet. App. 77a-78a.

These administrative authorities, along with others set forth in the petition, clearly support coverage of the petitioners' claims. *See* Pet. 26. In *Brown v. Marsh*, Mr. Brown was denied promotions in violation of Title VII, an applicable law governing the merit promotion process, and the district court found he would have received these promotions absent the violation. Pet. App. 27a-35a. Similarly, in *Mitchell v. Secretary of Commerce*, the Department of Commerce violated Title VII when it withheld a GS-13 promotion from Mr. Mitchell that he would have received in the absence of racial discrimination. Pet. App. 62a-63a. The factual determination made by the district court below—that petitioners would have received their respective promotions absent discrimination—is identical to that made by arbitrators and approved by the Comptroller General in 54 Comp. Gen. 312 and the F.L.R.A. in *Veterans Administration Hospital.* There simply is no principled basis for distinguishing

petitioners' claims from those in which agencies denied promotions in violation of collective bargaining agreements or other binding provisions.

Nor, does *In re John Cahill*, 58 Comp. Gen. 59 (1978), on which the respondents heavily rely, dictate a different result here. *See* Opp. cert. 8, 9 n.4. In fact, in *Cahill*, the Comptroller General reaffirmed the legal standard it originally set forth in 54 Comp. Gen. 312 (1974), holding that the violation of a nondiscretionary agency policy set forth in a collective bargaining agreement "coupled with a determination that but for that violation the grievant would have been promoted at an earlier date provides a proper basis for retroactive promotion and award of back pay." 58 Comp. Gen. 59, 62 (1978). In *Cahill*, the delay in a promotion, caused by clerical error, failed to violate any provision of the collective bargaining agreement and, therefore, failed to warrant coverage by the Back Pay Act. *Id.* at 63-64. Unlike *Cahill*, where there was no right to a prompt promotion that had been violated, in the present cases the right to be free from discrimination in the making of promotions was clearly violated, which should lead to coverage by the Back Pay Act here.

2. Respondents' opposition to the award of prejudgment interest here also seems to rest on the startling and erroneous premise that an agency is not legally obligated to award a promotion denied in violation of Title VII. *See* Opp. cert. 9. The government contends that while the Back Pay Act applies to "promotions that an agency is legally obligated to award . . . [t]he court-ordered promotions (and accompanying back pay) that petitioners received under Title VII are not of that nature." *Id.* This distinction, however, contravenes decades of Title VII jurisprudence.

Because of the equitable nature of Title VII, after liability is established, retroactive relief may not be awarded without a finding that the prevailing plaintiff would have received those remedies absent the discrimination.[3] While the agencies here

[3] *See, e.g., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-765 (1976) (Title VII "requires that persons aggrieved by the

originally had the discretion to cancel, rather than fill, the job vacancies that were at issue, once the decisions were made to fill the vacancies, the agencies had nondiscretionary obligations under Title VII to make the selections in a nondiscriminatory manner. Where courts find that selections were conducted in a discriminatory fashion and that, in the absence of discrimination, the plaintiff would have obtained the selection, the employer is obliged to offer the denied promotion and back pay as a remedy to make the plaintiff whole.[4] In accordance with the requirements of Title VII, the district court found that respondents considered race in denying promotions to petitioners and, that if race had not been considered, the petitioners would have received the promotions in the first instance. *See* Pet. App. 27a-35a, 62-63a. Contrary to the government's assertion, the district court's award of retroactive promotions to petitioners was predicated directly on the agencies' legal duty to promote petitioners to the positions they were due.[5] *See* Opp. cert. 9.

3. The respondents also contend, erroneously, that the 1978 amendments to the Back Pay Act failed to limit *United States v. Testan*, 424 U.S. 392 (1976) to its facts. *See* Opp. cert. 6-7. But, as the petitioners have already demonstrated in their petition, in the years preceding the 1978 amendments to the Act, the Comptroller General and the CSC had adopted an

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consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."); *Albemarle v. Moody*, 422 U.S. 405, 418-420 (1975) (the district court has the duty to render a decree that will to the greatest extent possible make whole the victims of racial discrimination); *Nord v. United States Steel Corp.*, 785 F.2d 1462, 1467, 1470, 1473 & n.11 (11th Cir. 1985); *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976).

[4] *See, e.g., Albemarle v. Moody*, 422 U.S. at 418-20; *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1122-23 & n.15 (3d Cir. 1988).

[5] The fact that these promotions were awarded pursuant to an order of the court does not, as the respondents seem to suggest, affect their coverage by the Back Pay Act. *See* Opp. cert. 9-10. The Act expressly contemplates that the district courts, among other entities, are "appropriate authorities" authorized to make awards pursuant to the Back Pay Act. 5 C.F.R. § 550.803 (1990).

expansive view of the "withdrawal or reduction" language in the statute. Pet. 14-16. To the extent that *Testan* was construed to apply beyond reclassification actions, it would have placed in question those administrative interpretations of the Back Pay Act. Because Congress wished to "incorporate the broader interpretation of the statute given the Back Pay Act" by the Comptroller General and CSC, and yet retain the *Testan* holding as applied to its facts, Congress codified *Testan* at the same time as it expanded the "withdrawal or reduction" language of the statute to cover certain denials of promotion. *See* Pet. 17-18, 21-22.

Respondents' contention that the administrative interpretations preceding the 1978 amendments are fully consistent with application of *Testan* to promotion denials simply makes no sense. As the court below recognized, the legislative history demonstrates that Congress intended to incorporate the broader administrative interpretations of the Act in its 1978 Amendments. Pet. App. 10a. Therefore, it should be obvious that Congress would not have taken any action with respect to the Back Pay Act unless the *Testan* decision, extended beyond its limited facts, would have been inconsistent with the broader administrative interpretations of the Back Pay Act that Congress endorsed.

4. Respondents have unduly minimized the divisions in authority governing coverage of unlawful promotion denials by the Back Pay Act. *See* Opp. cert. 11-12. In addition to the extensive administrative authorities authorizing the award of back pay to persons unlawfully denied competitive promotions,[6] the courts of appeals have split over their approach to this issue.

Not surprisingly, the respondents' treatment of this split in the circuits focuses on the outcome of their decisions, in each of which the award of back pay was denied. But, the approaches taken by the Federal and Tenth Circuits differ dramatically from the approach advanced by the District of Columbia Circuit below. Left unresolved, these differences

[6] *See* Pet. 13-20.

will result in the award of back pay against the United States by some circuits and its denial by other circuits in the same circumstances.

In *Naekel v. Department of Transportation*, the Federal Circuit denied retroactive promotions, and their accompanying back pay, to an employee who had been unlawfully discharged because he failed to demonstrate, as the Back Pay Act requires, that he would have received the promotions absent the unlawful conduct. 850 F.2d 682, 684 (1988). The court based its determination on Naekel's failure to satisfy his evidentiary burden, not on a determination that, as a matter of law, he was excluded from coverage by the Back Pay Act. *Id.* The court simply required that Naekel "establish a clear entitlement to retroactive promotions" in the absence of his unlawful termination. *Id.* at 683-84.

The Tenth Circuit has approached coverage of promotions by the Back Pay Act in an entirely different manner. In *Olsen v. Arrington*, the Tenth Circuit denied the claim for retroactive promotion of a civilian employee involuntarily removed from the Air Force. 621 F.2d 363 (1980). The court reasoned that Testan barred relief under the Back Pay Act for all denials of promotion. *Id.* at 366. According to the Tenth Circuit, federal courts simply may not "entertain suits by federal employees who claim to be entitled to a higher position." *Id.*

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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